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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

NO......

J. G. GLOVER, Petitioner and Appellant below,

VS.

UNITED STATES OF AMERICA, Respondent and
Appellee below,

**Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Fifth Circuit and
Brief in Support Thereof.**

TO THE HONORABLE THE CHIEF JUSTICE OF
THE UNITED STATES AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

Your petitioner, J. G. GLOVER,
respectfully shows:

1.

STATEMENT OF MATTER INVOLVED:

Petitioner was indicted in the Atlanta Division of the United States Court for the Northern District of Georgia for an alleged violation of the Mail Fraud Statute, (Title 18, Section 338 USCA). The indictment contained twenty counts and each count charged the same scheme to defraud and the only difference in the various counts was that each count alleged the use of the mails on a different occasion. (R. 5-44). The jury upon the trial of the case found the petitioner guilty upon all twenty counts. A motion for new trial was granted on two counts and overruled on the other eighteen (R. 702). The petitioner received a sentence on each count of a year and a day with the sentence on each count running concurrently. The case was appealed to the Circuit Court of Appeals for the Fifth Circuit and was heard by Circuit Judges Foster, Holmes and Hutcheson and affirmed by a two-to-one decision, with Circuit Judge Hutcheson dissenting (The Majority Opinion— R. 715-720) (The Minority Opinion— R. 720-725).

The judgment affirming the lower court was entered in the Circuit Court on the 23rd day of January, 1942, (R. 726) and, on February 10th, 1942, petitioner filed his motion for a rehearing in said case (R. 727), and, on the 23rd day of March, 1942, the motion for a rehearing was denied (R. 821).

From April, 1937, until after the indictment in this case in September, 1940, J. G. Glover was employed by the State Highway Board of Georgia, a department of said state, as Supervisor of State Forces. As Supervisor of State Forces he had charge of and supervision of the building of State Highways with State Convicts.

In connection with the building of highways with convict forces the State employed a great many other persons who worked with and in connection with the convict forces in road construction. All of this was done under the supervision of the State Highway Board of Georgia. The position held by petitioner was not a statutory position but that of an employee of the State Highway Board.

The petitioner had an office in the State Highway Office Building in the City of Atlanta, Georgia, and from his office in Atlanta supervised the activities of the various convict camps, acting through a warden for each camp who had immediate charge of the activities of the convict forces in the building of the roads. Petitioner as Supervisor of such forces made occasional visits and trips from one camp to another for the purpose of supervising the activities of the convict forces and the employees working in connection with them.

The wardens had immediate charge of the convict forces and other persons employed in each of these camps and petitioner had under his supervision from five to fifteen camps at a time. These convict camps were placed in most instances in out of the way places in the State and are used mostly for grading roads, the building of bridges and culverts necessary for drainage and making all preparations in the road necessary for paving.

At each camp buildings were constructed for housing the convicts and civilian employees and, in most instances, nearby a house was constructed for the purpose of housing the warden and the members of his family.

During Glover's employment by the State Highway Board of Georgia he had supervision of camps at

twenty-seven different locations. Near two of these camp sites Glover acquired title to small tracts of land and in another instance title was conveyed to him through mistake (R. 161, 551). These three camps were located in the counties of Dade, Dawson and Miller and on these three tracts of land the wardens in charge of the three convict camps constructed houses in connection with the camps to be used for housing the wardens and the members of his family in each particular instance. (R. 74, 130, 161, 555, 557, 559, 560, 562).

The Government indicted petitioner on account of these houses being constructed upon lands for which deeds had been executed conveying title to him and charged him with devising a scheme and an artifice to defraud the State of Georgia, the State Highway Board of Georgia and the citizens and taxpayers of Georgia by reason of these houses having been constructed upon his lands.

It was admitted in the case that the houses were constructed by the wardens with convict labor and other labor paid for by the State Highway Board of Georgia and that the material going into the construction of the houses was paid for by the State Highway Board of Georgia.

The use of the mails as charged in the indictment was the usual and ordinary routine mailing of requisitions for material, payrolls and checks in payment of materials and supplies by the State Highway Department which were alleged to have gone into the construction of the three wardens' houses. (R. 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44).

The indictment alleged that the scheme or artifice to defraud consisted of petitioner violating and disregarding the plan, rule and practice of the Highway Board which was alleged to be as follows:

“That it was the plan, rule and practice of said State Highway Board that the barracks and all of the buildings including houses for wardens necessary for said prison camps should be constructed upon lands leased for that purpose by said Highway Board from individuals with the provision that when said lands ceased to be used for the purposes of said Highway Board that said leases would be terminated and all of the buildings constructed upon said leased premises would become the property of the owner of the lands which were leased, and it was the further plan, rule and practice of said Highway Board that all of the buildings were to be constructed of rough and undressed lumber only, all of which defendant well knew.” (R. 8).

The indictment further alleged that petitioner disregarded the plan, rule and practice as set forth above, and that he would build houses “more elaborate in design and construction than was necessary for such wardens’ houses” (R. 9) and that said houses became the sole property of the defendant as follows:

“and that such valuable houses would not and should not be constructed and indeed were not constructed upon lands leased from individuals as was the plan, rule and practice of said Highway Board, but would be and should be built, and indeed were built, upon defendant’s own

land to which he had title individually in fee simple, and that said houses and dwellings having become attached to the realty of the defendant would be and should be, and in fact did become, the sole property of defendant;" (R. 9).

The indictment further charged that the petitioner deceived the three members of the State Highway Board in the following language:

"would and should, and in fact did, falsely and fraudulently deceive and mislead the said Highway Board in the payment of all bills for labor and material used in the construction of the houses and dwellings upon defendant's property and in the furnishing of said labor and other materials used in the construction thereof, and that defendant would and should, and in fact did, thereby, by means of such false and fraudulent pretenses and misrepresentations, pretend and represent that all of the houses and dwellings constructed in connection with such State prison convict camps were built and constructed in accordance with the usual and customary plan and practice of said Highway Board, concealing the fact that same were in truth and in fact built upon the lands of the defendant and built of more elaborate and expensive design and construction than was necessary and proper, all of which pretenses and representations were false and untrue, as defendant then and there well knew." (R. 10, 11).

As a result the indictment alleged that petitioner defrauded the State Highway Board of Georgia, the State of Georgia, and the people of the State of Georgia of the sum of ten thousand dollars.

The State Highway Board of Georgia approved of the building of these three houses by petitioner with full knowledge of all the facts (R. 248, 485). When the three wardens' houses were completed the wardens, who are employees of the State, moved into and occupied said houses and there was no claim of any dominion, right or ownership of said houses at any time by petitioner and the State of Georgia continued in uninterrupted possession of same (R. 485), until two of them were torn down and removed from petitioner's lands. (R. 695, 701).

During the trial of the case in the District Court which began on the 4th day of November, 1940, and ended on the 3rd day of December, 1940, the State failed to prove the rule, plan and practice of the State Highway Board as alleged in the indictment, that the three houses became attached to the realty of petitioner and that he became the sole owner thereof, that he deceived or misled the members of the State Highway Board in any manner whatsoever, or that the State of Georgia or any agency of the State had been defrauded.

In reference to the rule, plan and practice of the State Highway Board as alleged the Government conceded that it had not shown the existence of a rule requiring that the houses be constructed of rough and undressed lumber (Charge of Court, R. 680). As to the balance of the rule all four men who had been members of the State Highway Board during the time petitioner worked for said Board testified there was no such rule. (R. 240, 241, 242, 278, 279, 304, 305, 342, 417, 418).

The Secretary and Treasurer of the Board and several wardens testified that there was no such rule, plan and practice as alleged in the indictment. (R. 152, 389, 390, 391, 394, 395, 405, 406, 407).

As a matter of fact the Government's own testimony proved a different rule, plan and practice of the State Highway Board.

Your petitioner testified that there was no such rule, plan or practice. (R. 496, 498, 500). The uncontradicted testimony as to all witnesses for both the Government and the defense was that there was no such practice as alleged in the indictment to be the rule, plan and practice of the Highway Board. In this connection the majority opinion of the Circuit Court of Appeals for the Fifth Circuit held as follows:

"The indictment charged that the procedure followed by the appellant in building these houses violated the established plan, rule and practice of the state highway department. This allegation was surplusage and the failure of the proof to substantiate it had no effect upon the validity of the conviction." (R. 719).

As to the practice of the Board, Circuit Judge Hutcheson in his dissent said:

"The uncontradicted proof that there was no such practice on the part of the Board and particularly that the houses were placed on the defendant's property under circumstances which, under the law of Georgia, prevented their becoming attached to the realty or in any way becoming his, completely negated the charge and entitled the defendant to an instructed verdict of acquittal." (R. 724).

There was absolutely no evidence in the record to the effect that the three houses involved became a part of petitioner's realty and, therefore, his sole property. On the contrary, the three wardens who built the houses and petitioner swore positively that the houses were placed on the lands under a parol agreement or permission that the land was to be used without the payment of rent and that the houses were to be removed by the State Highway Department when they ceased to be used by the State Highway Department. (R. 124, 130, 74, 162, 564, 565, 573, 574). This testimony was positive, unimpeached and uncontradicted by any testimony or circumstance produced during the long days of the trial and the parol agreement under the law of Georgia had the effect of creating an easement running with the land and gave them the right to the use of the land for the purpose of placing the houses thereon and removing them under the law of Georgia.

The majority opinion of the Circuit Court of Appeals dismissed this question by saying that it was wholly immaterial in the following language:

"Whether appellant's statements in conversation with the wardens to the effect that the houses were removable by the Board, would be considered a binding agreement between Glover and the Board, which would create an easement in favor of the Board under the real property law of Georgia, is wholly immaterial." (R. 718).

Circuit Judge Hutcheson in his dissent said in this connection:

"These circumstances, established by the undisputed testimony of defendant and the two wardens who caused the houses

to be built and lived in them, are that they were placed on defendant's property for the use of the state and under an agreement and understanding that they were subject to removal at the state's will." (R. 721, 722).

Circuit Judge Hutcheson states positively that the testimony in this connection was undisputed. Circuit Judges Foster and Holmes evidently took it for granted that the testimony in this connection was undisputed and binding upon the Court because they waved it aside by saying that the whole matter is wholly immaterial.

Likewise, there was no evidence in the record to the effect that petitioner deceived or misled the members of the State Highway Board in any manner whatsoever. As a matter of fact, the members of the State Highway Board at the time of the transactions involved testified positively that there had been no deceit on the part of petitioner. (R. 252, 307, 426). The fourth member who was at one time a member of the Board did not mention in his testimony any deceit or effort to conceal anything on the part of petitioner. (H. 276-280).

There was absolutely no evidence produced upon the trial of this case to the effect that the State of Georgia, the State Highway Department or the people of Georgia had been defrauded. The uncontradicted testimony of the members of the Highway Board was to the effect that the houses were in their possession at the time of the trial, had at all times been used by the wardens and had at all times been in possession of the State. The Government in its argument on the trial of the case contended that neither the State of Georgia nor the State Highway Board were actually defrauded by petitioner (R. 697, paragraph 4).

The State Highway Board took the position that the State had not been defrauded (R. 485). The houses were in the possession of the State at all times and petitioner never at any time claimed any right to them (R. 485). Petitioner gave to the State Highway Board written authority to remove the houses when ceased to be used by the State (R. 485). The State was in possession of the houses at the time of the trial and had been at all times before then (R. 485).

After petitioner's trial and conviction two of the houses involved were removed from petitioner's lands by the State Highway Board (R. 695-701).

Petitioner respectfully shows that there was not introduced upon his trial any evidence showing any intent on his part to defraud the State or the State Highway Board. He had a definite and clear understanding with the wardens at each place where houses were built on his land in which he gave to the State the permission to use his lands and permission to remove said buildings before their erection began (R. 124, 130, 74, 162, 564, 565, 573, 574). This testimony was undisputed, unimpeached and uncontradicted by any witnesses or any circumstance in the case and, therefore, binding upon the Court, and negated any idea whatsoever of any intent on his part to defraud the State Highway Board or the State of Georgia.

The uncontradicted evidence of witnesses both for the Government and the petitioner proved that the rule, plan and practice of the Highway Board was not as alleged in the indictment but that the practice was to get permission, either orally or in writing, to use the lands of others and to build wardens' houses thereon and to remove the houses when the lands ceased to be used by the State.

The only conflict in the evidence was as to the estimated cost of the houses and this evidence was mere guesswork on the part of the witnesses.

At the conclusion of all the evidence in the case petitioner upon his trial moved the Court for a directed verdict, which motion was overruled, and then appealed his case to the Circuit Court of Appeals for the Fifth Circuit (R. 693, 674).

Petitioner also made timely written requests to charge which were overruled (R. 691-695).

The petitioner also made a motion for a new trial which was overruled by the Court on eighteen counts (R. 695-702).

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925 (Section 347, Title 28, U. S. C. A.).

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered on January 23rd, 1942 (R. 715). On February 10th, 1942, within the time allowed by the rules of said Court, petitioner filed a petition for rehearing (R. 727), which petition was denied and judgment entered March 23rd, 1942 (R. 821).

On the 20th day of April, 1942, within thirty days from the entry of said judgment this petition for a writ of certiorari is filed.

III.

QUESTIONS PRESENTED.

(1) To prove the existence of a scheme or artifice to defraud substantially as alleged in the indictment was it necessary for the Government to prove the rule, plan and practice of the State Highway Board of Georgia to be substantially as alleged in the indictment?

(2) To prove the scheme substantially as alleged in the indictment was it necessary for the Government to show that the houses involved became a part of petitioner's realty and, therefore, his property?

(3) Is it essential that the Government prove the existence of a scheme which, if successful, is calculated to defraud?

(4) Can the District Court or the Circuit Court of Appeals arbitrarily disregard the positive, unimpeached and uncontradicted testimony of witnesses?

(5) Should a conviction be sustained upon flimsy circumstantial evidence in the face of positive, unimpeached and uncontradicted testimony of witnesses when the circumstances are as consistent with the innocence of the petitioner as with his guilt?

(6) Can a conviction be sustained in this case in the face of the fact that the Government had failed to prove the existence of the scheme it alleged, or indeed of any scheme calculated to defraud, or of any actual fraud itself or that the houses became a part of petitioner's realty, upon the theory that the evidence justified the jury in reaching the conclusion that the petitioner, entertaining the hope or wish in

his heart that the State might fail or forget to remove the houses, permitted the wardens to build more expensive houses on his land than had been built on lands of others from whom permission had been obtained to build houses on their lands and to remove them when the State ceased to use them?

(7) Could the petitioner's property in this case have been materially enhanced in value, and State funds wrongfully diverted into his personal channels, when, according to the undisputed and uncontradicted testimony in the case, the houses were built upon his lands under a clear and definite agreement with the wardens that the lands could be used, the houses erected and the houses removed when the lands ceased to be used by the State, when such an arrangement was in keeping with the established practice of the State Highway Department and had the approval of the State Highway Board?

(8) Should the District Court have submitted to the jury petitioner's defense as requested in writing?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The District Court failed to direct a verdict of not guilty upon petitioner's motion and the Circuit Court of Appeals for the Fifth Circuit committed error in affirming this judgment.

(2) The Circuit Court of Appeals committed error in holding that the allegation in the indictment as to the rule, plan and practice of the State Highway Board was surplusage and the failure of the proof to substantiate it had no effect upon the validity of the conviction (R. 719).

(3) The Circuit Court of Appeals for the Fifth Circuit committed error in holding in reference to the question of whether or not the houses involved became a part of petitioner's realty under the permission given by him to the wardens to build the houses was wholly immaterial when it was alleged in the indictment as the gist of the scheme or device to defraud that the houses became a part of the realty and, therefore, the sole property of petitioner (R. 718).

(4) The Circuit Court of Appeals for the Fifth Circuit committed error in holding that the facts in this case show that petitioner's property was materially enhanced in value and that State funds were wrongfully diverted into personal channels (R. 719) when the undisputed, uncontradicted and consistent testimony of witnesses showed that the houses were placed upon petitioner's lands with a clear understanding that the State was to use the lands for the purpose and the houses were to be removed when the State ceased to use the lands (R. 719).

(5) The Circuit Court of Appeals for the 5th Circuit committed error in holding that the District Court's failure to give properly requested instructions to the jury relating to the effect under Georgia law of a verbal agreement for the removal of buildings from the lands of another was not error.

(6) The Circuit Court of Appeals for the 5th Circuit committed error in affirming the refusal of the District Court to direct a verdict upon motion and to give the requested written charges for the reason that the effect of their holding is to say that under the Federal law it is not necessary for the Government to prove a definitely formulated plan or scheme which was calculated, if carried out, to defraud, but, upon proof of their desires or imaginings, they can be found guilty, and sanctions the use of the Mail Fraud

Statute as a catch-all like the old common law conspiracies, which were used in England, for convicting persons just because they were deemed undesirable.

(7) The Fifth Circuit Court of Appeals in affirming the refusal of the District Court to give the requested charges and to direct a verdict ignored the positive, unequivocal, unimpeached and uncontradicted testimony of witnesses when all the circumstances of the case were more consistent with the innocence of petitioner than with the guilt.

(8) The Circuit Court of Appeals erroneously affirmed the actions of the District Court in failing to grant a motion for a directed verdict when it appears from the record that no scheme or device was established which, if successful, was calculated to defraud.

The Circuit Court of Appeals in this case has rendered a decision in conflict with the decisions of the Circuit Court of Appeals for the Ninth and Sixth Circuits on the same matter and has decided a Federal question in conflict with applicable decisions of this Court.

The Circuit Court of Appeals has also decided the above important questions of **general law in a** way untenable and in conflict with the weight of authority.

The Circuit Court of Appeals in affirming the District Court in its refusal to direct a verdict or to give requested charges has held in effect that under the Federal law it is not necessary for the Government to prove the plan or scheme to defraud as alleged in the indictment, that it is not necessary to prove a definitely formulated plan or scheme which is calculated, if carried out, to defraud, but sanctions the

use of the Mail Fraud Statute as a catch-all, as the old common law conspiracies were used in England whereby persons could be tried upon mere suspicions or for their desires and imaginings and, in so doing, has so far departed from the accepted and usual course of judicial proceedings and, in affirming the lower court, has sanctioned such a departure by a lower court, as to call for an exercising of this Court's power of supervision.

In holding that it is not necessary to prove the rule, plan and practice of the State Highway Board of Georgia, as alleged in the indictment, and in holding that it is not necessary to prove that the houses placed upon petitioner's lands became a part of his realty, as alleged in the indictment, has decided an important question of general law in a way which is untenable and in conflict with the weight of authority.

In holding as above set forth the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower court as to call for the exercising of this Court's power of supervision.

The effect of this decision is such that the Supreme Court should take jurisdiction of this case and definitely settle to what extent the Mail Fraud Statute may be used as a catch-all. In this case there was nothing wrong with the use of the mails as the items alleged to have been mailed were routine transmissions of ordinary payrolls, requisitions, etc., of a department of the State of Georgia. It was admitted by the Government that there was no actual fraud. The uncontradicted testimony of the Government's witnesses, as well as petitioner's witnesses, was to the effect that the State of Georgia had not been defrauded. The Circuit Court of Appeals in its opinion admits

that the Government did not prove the formation or the existence of a scheme or device to defraud as alleged in the indictment. The Government offered no positive evidence and relied entirely upon circumstantial evidence and if the verdict in this case is allowed to stand it must be based upon flimsy circumstantial evidence in the teeth of the positive testimony of uncontradicted and unimpeached witnesses. If a verdict is allowed to stand it must be solely upon the theory that in the teeth of this kind of testimony and the failure of the Government to prove the essential allegations of its indictment, the jury is permitted to say that based upon flimsy circumstances that the petitioner intended in his heart to defraud in some method or manner not definitely shown and, for that reason, is to be convicted.

It is well recognized by lawyers familiar with criminal trials that less evidence is required to convict in a prosecution under the Mail Fraud Statute than is required to recover in an ordinary civil suit. Therefore, this case presents an important question of Federal law which has not been, but should be, settled by this Court so as to definitely determine how far and to what extent the Federal Courts are to be permitted to go in using the Mail Fraud Statute in such a manner so as to prevent the same abuses as resulted from the use of the old law of conspiracies in England.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit in the case numbered and entitled on its docket No. 9921, J. G. Glover, appellant, vs. The United States of America, appellee, to the end that said case may be reviewed and determined by this Court, and that the judgment of said Circuit Court of Appeals be reversed and set aside by this Court.

Dated this the 20th day of April, 1942.

J. G. GLOVER,

By:.....

Roy V. Harris

.....

W. Paul Carpenter

Attorneys for Petitioner